1345 No. 3997 / 1345

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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HOFFSCHLAEGER COMPANY, LIMITED,
*Plaintiff in Error,*

vs.

MARGARET FRAGA, by Alfred Fraga, her guardian ad litem,
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR

**Upon Writ of Error to the Supreme Court of the Territory of Hawaii.**

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

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This cause is heard by this Honorable Court upon writ of error issued to the Supreme Court of the Territory of Hawaii.

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### Statement of Case.

In her complaint (Tr. p. 34) the defendant in error set out that the plaintiff in error maintained and operated in front of its place of business on Keawe Street in Hilo, on the public sidewalk, a sidewalk elevator used for the purpose of convey-

ing goods from the basement of said place of business to the sidewalk; that at the top of said elevator there was an opening in said sidewalk approximating four feet in width and five feet in length; that when the elevator is not in use the opening is closed by a grating (formed by two gates) which lies even with, and is used by pedestrians as part of the sidewalk; that on August 20, 1920, while the defendant in error was walking along said Keawe Street the plaintiff in error carelessly and negligently permitted one of the gates of said grating to remain open while the elevator was at the bottom of the shaft and that, without fault on her part, the defendant in error fell through the opening to the bottom of the shaft and was greatly injured.

The plaintiff in error entered a general denial to the complaint. After the jury had been impaneled and sworn and after some evidence had been taken the plaintiff in error moved for the withdrawal of a juror and for the entry of a mistrial in the cause on the ground of the publication, subsequent to the drawing of the jury, in one of the newspapers published in Hilo, owned by a corporation of which Mr. J. S. Russell, leading counsel for defendant in error, was president, of an article prejudicial to the plaintiff in error's cause. The motion was denied. A verdict for the defendant in error was rendered by the jury, damages being awarded her in the sum of $7250.

## Statement of Facts.

The facts briefly, as taken from the record, are as follows: On August 20, 1920, about three o'clock p. m., the defendant in error Margaret Fraga, aged almost thirteen (Tr. p. 166), was walking along Keawe Street (formerly Bridge Street) in Hilo, towards the store premises of the plaintiff in error situate on said street. Shortly before defendant in error appeared on that street the plaintiff in error had opened one of the gates of the elevator opening for the purpose of taking some freight from the store basement and delivering it to a wagon which was shortly expected (Tr. p. 200). The gate opened was that farthest from the defendant in error; a photograph of the grating as so open was introduced in evidence as defendant-in-error's exhibit "H". When both gates are closed the grating extends lengthwise with the sidewalk about forty inches, each gate being twenty inches wide; the sidewalk is between eight and ten feet wide and the grating covers about four feet of this width (Tr. p. 205). The gate when open rises about seventeen inches above the sidewalk and is plainly visible to anybody walking along the street (Tr. p. 206). The defendant in error for about three years immediately prior to the accident knew of the existence of the elevator and its purpose, used to pass it frequently and had very often seen freight unloaded at it (Tr. pp. 168, 175-8, 191-2). Towards and right up to this open grating defendant in

error walked, looking straight ahead and making no movement to avoid it (Tr. pp. 175, 178). She contended that her attention was then diverted, i. e., at the time when she was almost in the opening and it required *but one additional step* to place her therein. She took this step and fell down the shaft (Tr. pp. 168, 175). She sustained, besides a number of more or less trifling injuries, an injury to her left leg, the nature of which will be discussed hereinafter in connection with the errors assigned in the improper restriction of the cross-examination, and the excessive amount of the verdict.

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**Contentions of Plaintiff in Error.**

The general theory of plaintiff in error's case, underlying the several errors assigned, is that the verdict should be set aside and a new trial ordered for the following reasons:

1. That a mistrial should have been entered in the court below by reason of the fact that during the progress of the trial matters inadmissible in evidence, namely, that the plaintiff in error was protected by insurance and that the insurance firm had agreed to settle the case, were improperly brought to the attention of the jury through the medium of the public press;

2. That by reason of the undue, improper and oppressive restriction of the right of cross-examina-

tion, the plaintiff in error was deprived of the opportunity of making a full presentation of its case and was thereby prejudiced in its right to a fair trial;

3. That as a matter of law the contributory negligence of the defendant in error was such as to preclude her recovery for the injuries complained of;

4. That the defendant in error's instructions complained of are incorrect in that (a) they misstate the care required of the defendant in error, (b) they misstate the law applicable to this case under the facts, and (c) are improper in that the attention of the jury was directed to the sum claimed by the defendant in error;

5. That the verdict was contrary to the law and the evidence and was so excessive that it must be deemed the result of bias and prejudice and/or improper influence affecting the jury, and/or of their misunderstanding of the instructions given to them by the court.

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**Specification of Errors.**

The errors relied upon by plaintiff in error as they are set forth in the Transcript, pages 372-387, and as therein numbered, are as follows: Nos. 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21 and 24.

ERROR No. 3.

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion of the defendant-plaintiff in error duly filed in said cause on May 25, 1921, for the withdrawal of a juror and the entry of a mistrial in said cause, by reason of the publication, after a jury had been empaneled and sworn and the taking of testimony had commenced, of a newspaper article stating that an insurance company was defending the said cause and other matters prejudicial to the defendant-plaintiff in error and calculated to prevent a fair trial of the said cause.

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ERROR No. 6.

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness, V. E. M. Osorio, that he produce in court, for the purpose of further cross-examination of said witness in reference to his testimony as to its contents, a certain surgical work known as De Costa's (a copy of which was at the witness' house in Hilo) mentioned by him on cross-examination as an authority for the opinion testified to by said witness that if an injury such as he testified was suffered by the plaintiff-defendant in error, namely, a partial separation of the epiphysis of the tubercle of

the tibia, did not completely heal within three to four weeks, it would serve no purpose to keep the injured part immobile, and that the patient might then be permitted to walk, and that by giving the injured part as much rest as possible recovery could not be expected more quickly than when the patient was permitted to walk; the trial Judge denying the motion for the reason that he had allowed the witness to be examined and cross-examined on his ability as a surgeon.

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ERROR No. 7.

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

> "You don't mean, Doctor, that she would get well quicker by being allowed to walk and move, and having some of the force felt on that muscle than she would if she had not been allowed to walk?"

the said witness having testified previously that the muscle or set of muscles chiefly used in extending the leg, the quadruceps femoris uniting the tendon patellæ—is attached to that portion of the leg which was in the case of the plaintiff-defendant in error alleged to have been injured, namely, the tubercle of the tibia.

ERROR No. 8.

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

> "Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadruceps tendon tends to enlarge that separation and prevent ——"

the said witness having testified that the tendon in said question referred to was attached to that part of the leg alleged in the case of the plaintiff-defendant in error to have been injured and having further testified that the object a doctor has in view in treating such an injury is to prevent further separation of the tubercle and to allow the tubercle to get back to its normal position.

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ERROR No. 9.

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio, to put to him the following question:

> "Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?"

ERROR No. 10.

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

> "Q. You stated, Doctor, I think, that the allowing of the plaintiff to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you meant."

the said witness having testified previously as follows:

> "Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?
>
> A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls the ligament."

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ERROR No. 11.

That said Supreme Court erred in holding that the trial Judge committed no error during the course of the cross-examination of said witness V. E. M. Osorio in putting to the said witness and allowing him to answer in the affirmative the following question:

> "Q. (by Judge Thompson). Doctor, did you give this girl such treatment as your experience, your ability, and medical science would dictate, under the circumstances?"

the trial Judge having immediately prior instructed the witness that he need not answer the following question put to him by the defendant-plaintiff in error:

> "Q. Is is not a fact, Doctor, that an injured leg was during the time of your service in the Expeditionary Forces kept in a sling or hammock so that the muscle affecting the injured part would not play upon it?"

the said witness having testified on direct examination that he had served as a surgeon with the United States Expeditionary Force in Europe and had there had considerable experience with fractures, and the defendant-plaintiff in error having excepted to the question put as above by the trial Judge on the ground that it did not call for the standard of treatment which the law requires.

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ERROR No. 12.

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to allow the said witness V. E. M. Osorio, during his recross-examination by and at the request of the defendant-plaintiff in error, to examine a medical work known as "Keene's Surgery" which was present in court and which during his redirect examination had been exhibited to the said witness by the plaintiff-defendant in error, identified by the said witness and mentioned by him as an authority during said redirect examination, for the proposition that if an injury such as the plaintiff- defendant in error was alleged

to have suffered did not heal within three or four weeks a recovery could not be expected for some years, and to point out the passage in said medical work to which he, said witness, had reference; and also in refusing to permit the said witness to answer the following question:

> "Q. You have cited Keene's work on Surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th was not effected within three or four weeks it would not heal for years; will you please turn to the passage in Keene to which you have reference?"

the purpose of the proposed cross-examination being to lay the foundation for contradicting and impeaching the testimony of said witness.

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ERROR No. 13.

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the conclusion of the recross-examination of the said witness V. E. M. Osorio to strike out all the evidence given by the said witness to the effect that the authorities named by him supported the opinions to which he had testified, on the ground that the defendant-plaintiff in error had not been allowed to cross-examine the witness in regard to said authorities and that the court had refused to order the production of the books and authorities

referred to by said witness so that the defendant-plaintiff in error might be enabled to cross-examine the said witness in reference to his testimony as to their contents.

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ERROR No. 14.

That the said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the close of the plaintiff-defendant in error's case that a nonsuit be granted upon the ground that the evidence affirmatively showed such contributory negligence on the part of the plaintiff-defendant in error as to preclude any recovery by her.

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ERROR No. 15.

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

> "You are also charged that it is not the law that a person passing along the sidewalk in a city who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption."

ERROR No. 18.

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

> "Upon the question as to whether or not the plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition."

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ERROR No. 19.

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

> "You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering."

ERROR No. 20.

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

> "The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily, has been undergone by plaintiff, and how much she will undergo if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of $11,500."

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ERROR No. 21.

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the plaintiff-defendant in error, duly filed on the 6th day of June, 1921, to vacate and set aside the verdict of the jury awarding to the plaintiff-defendant in error against the defendant-plaintiff in error damages in the sum of $7250; to vacate and set aside the judgment rendered on said verdict on the 1st day of June, 1921, and to grant a new trial in said cause.

ERROR No. 24.

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made and duly filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon for the reason that the damages awarded to the plaintiff-defendant in error were excessive.

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## Argument.

THE MOTION OF PLAINTIFF IN ERROR FOR THE WITHDRAWAL OF A JUROR AND THE ENTRY OF A MISTRIAL SHOULD HAVE BEEN GRANTED.

This motion (Tr. p. 45) was made at the opening of court on May 25th (Tr. p. 129) and was based upon the publication of a certain article (Tr. p. 46) in "The Daily Post Herald" of Tuesday, May 24th. The "Daily Post Herald" is a newspaper of general circulation, printed and published in Hilo, Hawaii, where the trial of this cause took place. It is published by the Hawaii Post-Herald, Limited, a corporation, of which Mr. J. W. Russell, the leading counsel for the defendant in error, is president and a large stockholder (Tr. pp. 51, 54).

The article referred to, a copy of which forms part of the record herein (Tr. pp. 48, 50), was published under a display heading in the first columns of the front page of the newspaper. The

article contained a number of false, misleading and extremely prejudicial statements regarding the defense to defendant in error's claim. The caption, in large type, was as follows: "Fourteen Year Old Hilo Girl seeks $11,500 damages from *Insurance Firm* for Injuries". It stated that the plaintiff fell down an elevator shaft owned by Hoffschlaeger Co., that the circumstances of the case were *rather unusual;* that the *Insurance Company* was defending the case; that counsel (naming them) are appearing for the *Insurance Company,* which was *shouldering the responsibility* for Hoffschlaeger Co., and that the *Insurance Company* had agreed to *settle for a small amount of damages,* thus pointing out that an offer of compromise had been made, and leaving the reader to deduct therefrom an admission of liability.

It will be noticed that Hoffschlaeger Co. was but casually mentioned in the article, once in connection with the ownership of the elevator and later as having its responsibility borne by another, and that the *Insurance Company* was mentioned *four times,* and the jury, through the public press, was informed that an insurance firm:

(1) was being sued and was the real defendant;

(2) was defending the case;

(3) was shouldering the responsibility; and

(4) had agreed to settle for a small amount of damages.

It was thus impressed upon the jury that the plaintiff in error had no real interest in the case; that no question as to *liability* for the accident could arise, because the insurance firm, which (according to the article) was the real defendant, had agreed to settle, and that the Insurance Company was unreasonable in only being willing to settle for a small amount.

By means of this article matters were brought to the jury's attention which, even if true, would not have been admissible in evidence, and the admission of which would have been reversible error.

**Evidence that the defendant in an action for damages is insured against loss is inadmissible and its admission constitutes reversible error.**

To the general effect that evidence that the defendant in an action for damages is insured against loss, is not admissible and that its introduction in any way into the case is ground for a reversal of any judgment obtained therein by the plaintiff, see

*Stewart v. Bruce,* 179 Fed. 350;

*Roche v. Llewellyn Iron Works,* 140 Cal. 563;

*Pierce v. United Gas & Elec. Co.,* 161 Cal. 176, 118 Pac. 700;

*Fuller Co. v. Darragh,* 101 Ill. App. 664;

*Loughlin v. Brassil,* (N. Y.) 79 N. E. 855;

*Simpson v. Foundation Co.,* (N. Y.) 95 N. E. 10;

*Manigold v. Black River Traction Co.,* 80 N. Y. S. 861;

*Hordern v. Salvation Army,* 109 N. Y. S. 131;
*Odell v. Genessee Construction Co.,* 129 N. Y. S. 123;
*Iverson v. McDonnell,* 36 Wash. 73, 78 Pac. 202;
*Lowsit v. Seattle Lumber Co.,* 38 Wash. 290, 80 Pac. 431.

In *Iverson v. McDonnell* supra, the Supreme Court of Washington reversed the trial court for its error in allowing on the cross-examination of the defendant the introduction of just such information as was conveyed to the minds of the jury herein by the newspaper article in question, because of the undeniable tendency of such information "to either confuse or inflame the minds of the jurors". The Washington court cited and followed

*Manigold v. Black River Traction Co.,* supra. This was an action for personal injuries. The defendant's agent had called on the plaintiff along with a certain doctor. On cross-examination the agent was asked whom the doctor represented. An objection to that and to the following question, "Wasn't he representing the insurance company?", were both sustained and the jury was told by the court to entirely disregard the question. On appeal the verdict and judgment thereon for the plaintiff were reversed, the Appellate Court saying:

> "The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a re-

> covery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore,* 66 Hun. 630, 22 N. Y. Supp. 1119. * * * In the case at bar it is impossible to say whether the statement of the counsel that there was an insurance company behind the defendant influenced the jury in rendering the verdict which it did. We have called attention to the fact that the question as to the extent of the plaintiff's injuries was, upon the evidence, a close question of fact; one that was involved in doubt; and its determination ought not to be prejudiced by imparting to the jury the information that the verdict rendered by it, whatever its amount, would not have to be paid by the defendant, but would be paid by an insurance company, which was back of it."

The New York Court of Appeals has taken the same view. In *Simpson v. Foundation Co.,* supra, it said:

> "Evidence that defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even where the court strikes it from the record and directs the jury to disregard it, *unless it clearly appears* that it could not have influenced the verdict."

It is true that the New York court said:

> "unless it clearly appears that it (the improper evidence) could not have influenced the verdict."

However, when once such prejudicial information as the Daily Post Herald contained is gotten before the jury it becomes the duty of the party likely to be benefited thereby to see and affirmatively show

that no prejudice results therefrom. In *Manigold v. Black River Traction Co.,* supra, the court said:

> "It cannot be said that it (the evidence that defendant was insured) did not have such effect (influence the jury). The plaintiff upon whom the burden should rest, has not satisfied us that the improper statement did not influence the verdict rendered."

And in *Simpson v. Foundation Co.,* supra, the court said:

> "If the answer were unexpected, as claimed, it was the duty of the plaintiff's counsel himself to move to strike out the evidence and to ask the court to instruct the jury to disregard it. * * * He should have lost no time in getting it out of the record and doing his utmost to correct his mistake. A prompt withdrawal of the evidence by the counsel for the plaintiff would go farther toward correcting the evil than any motion made by the attorney for the defendant. While there was no proof in this case that the defendant was insured, by suggestion and indirection the jury were given to understand that such was the fact and the result, apparently, is reflected in the verdict."

Furthermore, the New York court seems to have adopted the sensible view that cautionary instructions are of no use once this highly prejudicial information has been placed before the jury.

See *Loughlin v. Brassil,* supra.

**Evidence that the defendant has offered to compromise the plaintiff's claim is inadmissible and its admission constitutes reversible error.**

Not only was the newspaper article entirely improper in bringing before the jury, as a fact, that

an unknown insurance company was defendant, but also in that it set forth that the insurance company agreed to settle the claim of defendant in error for a small amount of damages. Whether or not this be true, the conveying of such a piece of information to the jury was highly improper.

> "The law strongly favors the settlement of disputes outside of court, and to that end seeks in every way to encourage disputants to get together and compromise their differences. Courts realize that often a party to a controversy, though confident of the justice of his position, would rather buy peace than engage in litigation. But no prudent man would dare approach his adversary with an offer of compromise if he thought his adversary would be allowed to take advantage of his offer in court, and exploit it as a confession of weakness. To allay such fear, the courts have always denounced every attempt to prove an offer of compromise or to get before the jury the fact that such offer was made. 'The rule of law is that all confidential overtures of pacification, or other propositions between litigating parties, stated to be without prejudice, are excluded on grounds of public policy; and the reason of the rule is that, unless so excluded, it would be difficult to take any step towards an amicable compromise or adjustment'. *Ferry v. Taylor,* 33 Mo. 323."
>
> *Marshall v. Taylor*, (Mo.) 153 S. W. 527, 530.

That the Marshall case, just quoted from, states the undoubted weight of authority is borne out by the following text writers:

2 *Chamberlayne on Evidence,* Sec. 1440;
1 *Greenleaf on Evidence* (16th Ed.), Sec. 192;
*Underhill on Evidence,* Sec. 75;
2 *Wharton on Evidence* (3rd Ed.), Sec. 1090;
2 *Wigmore on Evidence,* Secs. 1061-2.

The first mentioned writer states the rule as follows:

> "Sec. 1440. The Rule of Exclusion.—So highly does the positive law regard the attainment of peace between parties to a controversy that a rule of procedure, the substantive law applied to procedure, has, though with ever decreasing stringency, ordained that if such could reasonably have been the motive for making the offer of compromise it will be taken, as matter of law, that such was the object. It will be assumed that the thought was to buy peace regardless of liability. It is, accordingly, the fiat of procedure that the statement should not be received against the party making it. It is peremptorily rejected, when offered for such a purpose. Any act, other than a statement, done for the purpose of facilitating a compromise settlement will be excluded for the same reasons, should the inferences from it tend to establish a concession of liability on the part of the doer. In certain jurisdictions the mere fact that an offer of compromise has been made, even that an intimation has been extended to the effect that such an offer would be made have been treated as equally excluded by the rule of procedure. All evidence in respect to the terms of such a statement or suggestion is rejected."

The cases of

*Chicago B. & Q. Ry. v. Roberts,* (Colo.) 57 Pac. 1076;

*Gulf, C. & S. F. Ry. Co. v. Bagley,* (Tex.) 127 S. W. 254;

*Toledo, etc. Ry. Co. v. Burr,* (Ohio) 92 N. E. 27;

and

*Home Ins. Co. v. Baltimore Warehouse Co.,* 93 U. S. 527;

not only expound the rule excluding offers of compromise from the jury but emphasize the added importance and rigidity of that rule when the issue involved, that is, whether or not the defendant is liable in damages, is a close question.

In the Roberts case, supra, an action brought to recover damages from the Chicago B. & Q. Ry. for killing a horse, the admission of a letter offering $35 in settlement of plaintiff's claim was assigned as error. The court said:

> "While the ruling is important in this case, since without the letter, the testimony tending to show that the plaintiff's horse was killed by or through the negligent operation of defendant's train was very meager, the real importance of the question is found in the far-reaching effect that its determination may have upon future negotiations by railway companies in the settlement, out of court, of like claims."

In the Texas case, *Gulf, etc. Ry. Co. v. Bagley,* supra, the court said that the

> "testimony showed an offer of compromise and was inadmissible. The policy of the law

favors such settlements and therefore protects negotiations for that purpose. * * *

"Besides, the testimony bearing upon the controlling question in the case was very conflicting and renders at least doubtful the question of negligence charged on the part of appellant, and the admission of incompetent testimony in such a case, with a view of limiting its consideration, or removing its damaging effect upon the jury by the charge, is a dangerous practice not to be commended."

**The law will presume prejudice from the fact that certain inadmissible evidence has been received by the jury.**

To show how strong the policy of the law is that such offers shall not be called to the attention of the jury in any way, the courts have very generally refused to go into the question of how far the fact that evidence of the offer of compromise has gotten before the jury has in fact really prejudiced the defendant,

*Sherer v. Piper,* 26 Ohio St. 476,

and have likewise adopted the view that cautionary instructions are useless once the jurors have heard.

*Gulf, etc. Ry. Co. v. Bagley,* supra;

*Georgia Ry. & Elec. Co. v. Wallace & Co.,* (Ga.) 50 S. E. 478;

*McHenry Coal Co. v. Snedden,* (Ky.) 34 S. W. 228.

In the Georgia case, Wallace & Co., in an action to recover damages to one of its teams, sought to introduce evidence of a compromise of the claim of the driver of the team, a third party. The defendant's objection to its admission was sustained.

The defendant then moved for a new trial but the motion was denied, the court cautioning the jury that the evidence objected to was not evidence in the case. The Supreme Court, in reversing the trial, said:

> "It costs time, trouble and money to defend even an unfounded claim. Parties have a right to purchase their peace * * * The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence."

In the Snedden case, just cited, the Kentucky Court of Appeals reversed the judgment obtained in the trial court, although:

> "The attorney for plaintiff then withdrew the statement and told the jury that as the court had sustained the objection, they must give no weight to what he had said in regard to the letter."

And is the fact that the information, whether true or not, that (1) an insurance company was the party defendant, and (2) that the insurance company had agreed to settle for a small amount of damages, was placed before the jury through the medium of a local newspaper read by at least one of the jurors (Tr. pp. 79, 81), any ground for distinguishing the present case from those many cases which hold the conveying of evidence to such effect

to a jury to be ground for a new trial? We earnestly submit that it is not, either on principle or on authority. And this contention is made at this point without regard to the fact that the plaintiff in error contends that the article was inspired. The fact that there had been any suggestion of compromise of the case was known, as the affidavits on file show (Tr. pp. 57, 78) only to Mr. Stanley and Mr. Fred Patterson, counsel for defendant in error, and colleague of Mr. J. W. Russell, the president of the corporation publishing the newspaper in which the highly prejudicial and colored article appeared. Mr. Patterson was seen in close conversation with a reporter for the Herald, the writer of the article, on the morning of May 24, 1921, while the jury was being impanelled (Tr. p. 74), the article being published on the afternoon of the same day; there is an affidavit from one E. C. Compton (Tr. p. 74) that the reporter told him that he had received his information from one of the attorneys in the case, and while there are affidavits and counter-affidavits from others, there is not a syllable uttered by Mr. Patterson. However, whatever the facts as to the inspiration may be, it remains undisputed that the article, in its nature highly prejudicial to the cause of plaintiff in error, was published, was accessible to the jury and *was read by at least one of them.*

**It is error for a jury to read a newspaper containing inadmissible evidence.**

Every reason for excluding from the jury evidence at the trial that an insurance company will

meet any judgment rendered against the nominal defendant, and for the exclusion of evidence that the defendant had offered to compromise the claim of the plaintiff, exists likewise against the receiving by the jury of that same information in other ways, and more particularly through the public press.

> "The widely-read and influential daily journal, speaking for as well as to the public, reflecting popular sentiment as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single private individual * * *. It seems to us impossible to distinguish between the mischief done by oral or written or printed communications".
>
> *Cartwright v. State,* 71 Miss. 82, 86.

It is true that a new trial is not granted in every case where the jurors read something in a newspaper relating to the case on trial. The Supreme Court of Hawaii, in its opinion rendered below, affirming the judgment of the trial court, cites in support of that general proposition (Test. p. 357) 20 R. C. L. p. 254, Sec. 36; 2 *Thompson on Trials,* Sec. 2561. Those two authorities state, however, that the reading of an article "does not necessarily call for the granting of a new trial, *if* the article contained nothing of an unfair or prejudicial character" (20 R. C. L. 254), nor "*unless* the newspaper contain reports of the trial or other prejudicial matter in the form of editorial comments or otherwise." (2 *Thompson Trials,* Sec. 2561.)

That the newspaper article in question was unfair and prejudicial cannot be questioned. The statements contained therein could not have been presented to the jury in any other way without being grounds for the reversal of any judgment obtained by the plaintiff.

To the effect that the reading by a jury of a highly prejudicial or unfair article containing information that could not have been introduced in evidence at the trial is ground for the reversal of any judgment obtained by the plaintiffs and the granting of a new trial, see:

*Mattox v. U. S.,* 146 U. S. 140;
*Meyer v. Cadwalader,* 49 Fed. 32;
*Morse v. Montana Ore-Purchasing Co.,* 105 Fed. 337;
*U. S. v. Ogden,* 105 Fed. 371;
*People v. McCoy,* 71 Cal. 395, 12 Pac. 272;
*People v. Stokes,* 103 Cal. 193;
*People v. Wong Loung,* 159 Cal. 520;
*State v. Tilden* (Idaho), 147 Pac. 1056;
*West Chicago St. R. R. Co. v. Grenell,* 90 Ill. App. 30;
*Trohey v. Chicago City Ry. Co.,* 168 Ill. App. 1;
*Com. v. Landis,* 12 Phila. (Pa.) 576.

The case of *United States v. Ogden,* presents very well the general proposition for which it is above cited. A motion for a new trial was granted because the jurors read a newspaper article which

amongst other things called attention to the fact "that the defendant did not venture to testify in his own behalf," an assertion which neither judge nor counsel would have been permitted to make during the course of the trial.

> "I need hardly say that the publishing of such comments during the course of the trial was a flagrant impropriety. If the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offense punishable by fine and imprisonment would have been committed; and it is little less blamable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal."

The new trial was granted.

The California court said, in *People v. McCoy,* supra:

> "There is no doubt, however that the reading of newspapers by jurors, while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial."

The Grenell case, *West Chicago Street Rr. Co. v. Grenell* (supra), 90 Ill. App. 30, 48, states the rule thus concisely:

> "That the reading by jurors of newspaper articles prejudicial to one of the parties is cause for a new trial, we regard as well settled. People v. McCoy, 71 Cal. 395; People v. Stokes, 103 Ib. 193; Cartwright v. The State, 71 Miss.

82; Walker et al. v. The State, 37 Tex. 366; Carter v. State, 77 Tenn. (9 Lea) 440; Farrar v. The State, 2 O. St. 54."

**The affidavit of a juror that he read a certain newspaper article is admissible.**

There can be no doubt that at least one of the jurors in the present case read the prejudicial article in the "Daily Post-Herald" during the trial of the cause (see affidavit of R. F. Forrest, Tr. p. 79, and accompanying affidavit of C. A. Namohala, Tr. p. 81). And there can be no question but that a juryman can testify or offer an affidavit to the fact that he has read such a newspaper article.

> "A juryman may testify to any facts bearing upon the question of the existence of any extraneous influence although not as to how far that influence operated upon his mind."
>
> *Mattox v. United States,* supra.

The above case was followed and cited by a case in the District Court for the Eastern District of Pennsylvania, *United States v. Ogden,* supra.

> "Here there is positive proof that the article was read, if the jurors were competent witnesses upon this subject. Objection to their testimony was made by the government on the well-known ground that jurors are ordinarily not permitted to impeach their own verdict. But there is no doubt of their competency to testify to the mere fact of having read or seen the newspaper (Mattox v. U. S., 146 U. S. 149, 13 Sup. Ct. 50, 36, L. Ed. 917) although they could not be permitted to testify that the article had or had not influenced their minds. This is an inference which the court is to draw in each particular case, and it will be a more or less

probable inference according to the character of the comments complained of."

And again, in *Morse v. Montana Ore-Purchasing Co.,* 105 Fed. 337, 345:

> "Under this authority, (the Mattox case) it was not competent for jurors to prove by their affidavits what influence these articles they read had over them, or what motives actuated them in rendering their verdict. It does not appear what articles the jurors read, but any of the articles from which the above quotations are taken would have had a tendency to influence a juror and make him partial to the defendant. Some of the jurors, in their affidavits, state that they purposely avoided reading the objectionable articles. How, as to most of them, they could have known that they were objectionable, without reading their headlines, or reading a portion of the articles themselves, it is difficult for the court to apprehend."

Thus it can be seen from those two cases that the plaintiff in error could have done nothing more than was done to show the effect of the reading of the article on the juror or jurors.

**The law will presume that jurors have read current newspaper articles dealing with the trial, there being no showing to the contrary.**

Not only is there a natural deduction from the proof that one of the jurors read the article, that other members of the jury also read it, and probably discussed it, but the law will presume that it has been read without any showing that it was even read by one juror, if there is no showing to the contrary. See *Meyer v. Cadwalader,* supra;

*Morse v. Montana Ore-Purchasing Co.*, supra; *State v. Tilden*, supra; *West Chicago St. Rr. Co. v. Grenell*, supra; *Trohey v. Chicago City Ry. Co.*, supra; *People v. Stokes*, supra.

The Idaho Supreme Court in *State v. Tilden*, supra, 147 Pac. 1056, 1060, very well expresses the same principle:

> "It is earnestly urged by counsel for the respondent that the showing made by appellant is insufficient upon this point in that it has not been shown that any member of the jury read said newspaper article, in violation of the order of the court, or was influenced thereby in reaching a verdict; neither is it shown that the articles were not cut from the papers, in conformity with the order of the court, before they were given to the jury.
>
> "Since the court carefully instructed the jury to refrain from reading newspaper reports about the trial, and since he also instructed the bailiff to cut from any newspapers given to the jury such reports, it is very apparent that it would be difficult for counsel for the appellant to procure from the members of the jury or the bailiff affidavits that they had violated these orders. It is equally apparent that it would have been an easy matter for counsel for the respondent to procure affidavits that such orders had not been violated, if, in fact, they had not.
>
> "It was incumbent upon counsel for the respondent, if the bailiff cut from the said newspapers the articles complained of, to have presented his affidavit, showing that fact, to the trial court, in opposition to the motion for a new trial, and it was likewise incumbent upon counsel for the respondent to have presented the affidavits of the members of the jury show-

ing that they had not read the articles complained of if they had not. The failure to do this raises a strong presumption that the newspapers, containing such articles, got into the possession of the jury while it had the case under consideration, and that said articles were read by its members. The law upon this point, as we view it, is clearly stated by Chief Justice Sharkey in the majority opinion of the court in the case of *Hare v. State,* 4 How. (Miss.) 187, as follows:

"'It seems to me that the line of distinction is here so clearly drawn that it is impossible to mistake it, and so fortified by reason as to place it beyond doubt. It is briefly this: If the purity of the verdict might have been affected, it must be set aside; if it could not have been affected, it will be sustained.'"

In the Trohey case,—*Trohey v. Chicago City Ry. Co.,* supra,—the Illinois court cited and followed *Meyer v. Cadwalader,* supra; *People v. Stokes,* supra; and *West Chicago St. Ry. Co. v. Grenell,* supra. To quote at length:

"That such an article, published in a newspaper of general and wide circulation, was well calculated to strongly prejudice the jurors against the defendant in the case, we think too clear to admit of question; and, while there is no intimation that the plaintiff was in any way responsible for the fact, its probable effect upon the jurors must have been exceedingly harmful. It is true, there is no positive and direct evidence that the jurors read the article, but we do not regard it as necessary that such a showing should be affirmatively made. In Meyer v. Cadwalader, 49 Fed. 32, a new trial was granted upon substantially the same showing that was made in this case without any direct evidence

being offered that the jurors had read the objectionable matter. In passing upon the question the court said:

"'It is idle to say that there is no direct evidence that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session, and it is incredible that, going out into the community, they did not see and read these newspapers. That these public statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict.'

"In People v. Stokes, 103 Cal. 193, the court was considering the effect of similar newspaper publications upon a jury, and was passing upon the question whether or not it must be affirmatively shown that the jury were actually influenced thereby and the court said that 'the rule laid down by the foregoing cases, namely, that where an irregularity is shown that may have influenced the result, it is for the successful party to show as a matter of fact it did not, rests upon sound principles' (citing Section 27, Hayne on New Trial and Appeal).

"In West Chicago Street Railroad Company v. Grenell, 90 Ill. App. 30, this court passed upon the probable effect upon a jury of an article seriously reflecting upon the railroad company, against which a verdict was recovered in the court below, and Mr. Justice Adams, delivering the opinion of the court, said: 'The articles also plainly intimated that witnesses for appellant were bribed and were, for other reasons, unworthy of credit'.

"And, upon a showing that newspapers, containing the articles in question, came into the hands of the jurors, this court reversed the judgment of the court below, and said: 'In short, the probable effect of the articles on the mind of the ordinary juror would be to prejudice him against the appellant and its witnesses, and to intimidate him, and swerve him from an impartial consideration of the case.' * * * 'It has been held in cases like the present, that direct evidence that newspaper articles prejudicial to one of the parties were read by the jurors, or some of them, is not necessary to warrant the granting of a new trial; that it may be inferred from circumstances that the jury read the articles.' * * * 'That the reading by jurors of newspaper articles prejudicial to one of the parties is cause for a new trial, we regard as well settled. People v. McCoy, 71 Cal. 395; People v. Stokes, 103 Id. 193; Cartwright v. The State, 71 Miss. 82; Walker et al. v. The State, 37 Tex. 366; Carter v. State, 77 Tenn. 440.' * * * 'No affidavits of jurors were produced denying the reading of the articles in question, although it is familiar law that the affidavits of jurors to sustain their verdict are admissible. We are of the opinion that on the affidavits in respect to the articles in question, the court should have granted a new trial.' "

**A motion for the withdrawal of a juror and entry of a mistrial is a proper motion when inadmissible evidence has been placed before the jury.**

The Supreme Court of Hawaii, in its opinion below (Tr. p. 360), did not decide that the motion of plaintiff in error to withdraw a juror and enter a mistrial was an erroneous method of procedure to have undertaken. The following authorities, all

of which have already been cited, are cases involving the denial of such a motion by the trial court, and the reversal by the appellate court, of the judgment rendered by the trial court because of such denial. *Meyer v. Cadwalader,* 49 Fed. 32; *Laughlin v. Brassil,* (N. Y.) 79 N. E. 855; *Simpson v. Foundation Co.,* (N. Y.) 95 N. E. 10. See also *Vaughan v. Magee,* 218 Fed. 630.

Thus we see that plaintiff in error acted properly in trying to protect itself from the prejudicial effect of the jury's having received the information conveyed to it by the article in the Daily Post-Herald. We say "conveyed" advisedly for as we have said above, we believe the article was "inspired" and that the facts bear out our belief.

**It is error for a jury to read a newspaper containing inadmissible evidence, although the publication was not caused by the party benefited thereby.**

However, we need not and do not depend upon the motive or authorship of the article. The cases of *Morse v. Montana Ore-Purchasing Co.* supra; *Trohey v. Chicago City Ry. Co.,* supra, both bear out the contention that it is immaterial who caused the publication of the objectionable articles.

> "As to whether or not the defendant instigated the publication does not appear, * * * it is not always requisite, however, that any undue influence brought to bear upon a juror should be the act of either party. In the case of Mattox v. U. S., supra, a bailiff in charge of the jury presented to it the damaging publica-

tion. In *Hayne on New Trial and Appeal* (section 48) it is stated:

"'It cannot be doubted that where attempts to influence jurors are made with the knowledge or acquiescence of a party they must be considered as made by himself, and necessitate a new trial. The cases, however, go further and hold that attempts to tamper with a jury, made by the relatives or friends of a party without his knowledge, are causes for setting aside the verdict.'

"* * * That (the articles) were written or instigated by persons friendly to the defendant, their contents leave no room to doubt. I would go further and hold, however, that if it can be established that the verdict of a jury was influenced by any one, even though not a party to the suit, or a relative or friend of such party, it ought not to stand. The verdict of a jury should be the result of its unbiased action. When a jury is influenced by such articles as are presented in this case, it is difficult to prove who instigated them."

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**THE RESTRICTIONS PLACED BY THE TRIAL COURT UPON THE CROSS-EXAMINATION BY PLAINTIFF IN ERROR OF DOCTOR OSORIO CONSTITUTES PREJUDICIAL AND REVERSIBLE ERROR.**

The specific errors to be considered under the above heading are numbered 6, 7, 8, 9, 10, 11, 12 and 13. Of these, errors numbered 7, 8, 9 and 10 relate to testimony sought to be elicited from the witness, Doctor Osorio, upon his cross-examination, to which evidence objections were sustained by the trial court. Error No. 11 relates to an improper question asked by the trial court of the

witness on his cross-examination, and errors numbered 6, 12 and 13 relate to the refusal of the trial court to permit the witness to be cross-examined upon medical authorities cited by him in support of his testimony. These various groups of error will be taken up in the order named. In order properly to understand the importance of the testimony sought to be elicited from the witness upon cross-examination and the seriousness to plaintiff in error of the rulings of the trial court, it is necessary to explain briefly the precise nature of the alleged injury and the physiology of the part said to have been affected.

Whatever injury there may have been was to the left leg at a place about one inch below the head of the tibia or anterior bone of the lower part of the leg. Every bone has at each end what is known as an "epiphysis" which differs during adolescence from the shaft of the bone in being not truly bone but of an osseous nature (sometimes called "soft bone"), and which as maturity is approaching calcifies and hardens, and becomes bone from the twentieth to the twenty-fifth year (Tr. pp. 236-8). The epiphysis is separated from the main part or shaft of the bone by cartilage or cartilaginous substance, which is called the "epiphyseal cartilage" and in an X-ray plate appears darker than the bone (in a picture, lighter) and is called the "epiphyseal line" (Tr. pp. 23, 7). Connected with and part of the epiphysis at the upper end of the tibia and about one inch below the head thereof, is a

tongue-like downward projection which runs parallel with the shaft of the bone and is known as the tuberosity or tubercle; as used by medical men the "epiphysis proper" and the "tubercle" are spoken of as two different parts of the epiphysis (Tr. pp. 238, 240-247). In Exhibit "C" the epiphyseal line separating the epiphysis proper, body or main part of the epiphysis, from the shaft is shown by the line marked "a-c" and the part separating the tubercle from the shaft is shown by the continuation of that line marked "a-d".

To the "tubercle" is attached the tendon called the "patella ligamentum" which passes over the knee, and to which are attached the four powerful muscles of the thigh called "quadruceps femoris" and through this tendon or set of muscles tension is applied to, or there is a pull on, the tubercle every time the leg is extended or flexed (Tr. pp. 243, 266, 267, 318, 319).

As regards the epiphysis there may be three kinds of injuries: (1) a fracture of the epiphysis proper, (2) a fracture of the tubercle, and (3) a separation of the tubercle or tuberclar end of the epiphysis. A fracture of the epiphysis or epiphysis proper as used by medical men means a fracture of that portion of the epiphysis shown on Exhibit "C" above the line "a-c" and would represent a "much more serious condition" and an injury "totally distinct and recognized as totally distinct" from separation of the tubercle (Tr. pp. 240-242, 246, 247). Besides a fracture of the epiphysis proper there

can also be a *separation* thereof, and this again is distinct from a "separation of the tubercle" and is a very serious and often fatal injury (Tr. pp. 240, 242). There is also a great distinction between a *fracture* of the tubercle and a *separation* of the tubercle (Tr. pp. 240, 242).

On Dr. Osorio's direct examination he testified that he diagnosed the injury as a "separation at the epiphyseal end of the bone from the main shaft" (Tr. pp. 215, 216), and on cross-examination as a "fracture of the whole of the epiphysis to its full extent" (Tr. p. 236). On further cross-examination this position was abandoned by him and he admitted that the *only injury* he claimed to exist was a *separation* and *not even a fracture* of the tubercle (Tr. p. 240). He admitted that there is always up to maturity a normal amount of separation as shown by the epiphyseal line, the width of such separation differing with different individuals and (Tr. pp. 239, 252, 253) varying at different ages and, as the epiphysis ossifies, gradually becoming smaller and smaller (Tr. p. 247); that the separation shown in Exhibit "C" on the epiphyseal line "a-c" was normal and that the only abnormal separation appeared below the point marked "a" and between that and the end of the tubercle at the point marked "d". It will thus be seen that there was finally claimed no injury to the *epiphysis proper* and no *fracture* of the tubercle, the possible injuries mentioned as (1) and (2) above.

On his direct examination Dr. Osorio testified that while the leg showed at the time of trial some improvement, there was still considerable swelling below the knee at the calf; that there was still separation; that this condition might continue or last until she was between the ages of twenty and twenty-five; and that he thought that at that time it would be cured to "a certain extent", "not a complete cure" (Tr. pp. 220, 221).

On cross-examination the doctor testified finally to a *separation of the tubercle;* that the recognized treatment for such a condition is *rest* and bandaging and that the healing of such an injury under proper treatment generally takes place within from three to five weeks (Tr. p. 243). The evidence of the defendant in error was that at the expiration of two weeks after the accident she was walking around her house, was not regularly in bed and went back to school on September 11th (Tr. pp. 181, 184, 192). The evidence of Dr. Osorio was that at no time was the injured leg kept immobile (Tr. pp. 263, 280, 281); that his instructions were that she be left quiet in bed with "as little motion as *possible*" (Tr. p. 214), with pillows on either side which would prevent to some extent motion in the bed "as long as they were kept in position" (Tr. p. 281), and that at the expiration of three weeks he permitted the defendant in error to attend school, and walk around her house and yard and the school

premises. The reason given by him for thus allowing the defendant in error to walk around was that

> "Walking would not 'necessarily' or 'ordinarily' or 'under any circumstances' retard recovery because 'after the separation showed no complete healing at the end of 3 or 4 weeks it is unnecessary to keep the patient in bed for if you don't get recovery in that time it will surely not develop at the end of 9 months'" (Tr. pp. 264, 265).

He took the same position later when he testified that:

> "If the separation does not heal, there is *nothing to do* but *to leave it alone,* and let nature take care of it" (Tr. p. 288).

He further testified that under the treatment he was giving it, even when allowing the defendant in error to walk around, he did not expect that the leg would heal speedily, but expected the leg to heal "not speedily, but slowly" (Tr. p. 264).

He also testified that the injured leg was never kept *immobile,* that the adhesive plaster which he first applied and the rubber bandage later substituted for it would both allow flexion and extension of the leg and permit the play of the tendon on the injured part.

All of the above was developed on the cross-examination of Doctor Osorio, and the whole purpose of his cross-examination was to show by him that the injury, if any, was of a *minor character;* that there was nothing whatever to justify the claim of a *permanent injury;* that the action of the

tendon and muscles on the tubercle to which they were directly attached tended to enlarge the separation and retard union or healing; that if that action were prevented a complete cure could speedily be effected; to discredit the witness; and, by confronting him with the authorities on which he relied, to show while he was on the witness stand that there was no authority for the position taken by him that a complete cure might never be expected and that it was only when the defendant in error reached her twentieth or twenty-fifth year that a cure to "a certain extent could be expected".

When it is borne in mind that heavy damages could be awarded only in a case of permanent injury, or an injury lasting for a number of years, it will be readily recognized that Dr. Osorio's evidence in chief had to be broken down and discredited, and that *great latitude* should have been allowed in the conduct of his cross-examination, which we submit did, to the extent it was allowed, considerably weaken the doctor's evidence on direct examination.

In view of the contention of plaintiff in error, as substantiated fully by the testimony of its witness Dr. L. L. Sexton (Tr. pp. 307-342) that the injury to defendant in error's leg was not serious nor permanent but that with ordinary care would completely heal in not to exceed six weeks, and in view of the fact that many of the jurors, as appears from their names (Tr. p. 47), and the witness Dr. Osorio, are natives of Hawaii, and that, therefore,

in all probability his testimony would receive greater weight than that of Dr. Sexton, it was extremely important to the defense of plaintiff in error that such testimony of Dr. Osorio on cross-examination as conflicted with his direct examination or threw doubt upon the value of the treatment rendered by him, or the conclusions stated by him, should have been permitted to have been stated by the witness to the jury in the unequivocal manner required by the questions which the trial court refused to have answered.

The testimony already elicited from the witness upon cross-examination having shown that the tendon known as "patella ligamentum" is attached to that portion of the leg which is alleged to have been injured, the tubercle, plaintiff in error was entitled to the direct statement from the witness that each time the leg was extended the action of the tendon would be to pull upon the tubercle and thus enlarge its separation and prevent healing (Error No. 8). Likewise, the witness should have been permitted to answer the question whether it was his conclusion that the defendant in error would get well sooner by being allowed to walk and move than if she had not been allowed to walk (Error No. 7) and whether or not it was not necessary to prevent any action of the muscles on the injured part in order to guard against further separation of the tubercle and to allow it to resume its normal position and recover naturally (Error No. 9).

In answer to a question on cross-examination whether it is not a fact that each time plaintiff in error extended her leg the tendon was pulling on the injured part, the witness testified that he had expected by due counter-irritation to have a certain amount of bone tissue to heal it (Tr. p. 267). The witness was then asked on cross-examination (Tr. p. 272) to explain what he meant by counter-irritation. The trial court without objection having been made by counsel for defendant in error stated to the witness that he need not answer the question (Error No. 10). That this was extremely prejudicial to plaintiff in error must be apparent from the fact that the witness was offering to the jury his theory of counter-irritation as the reason and justification for permitting defendant in error to walk and otherwise use the muscles of her leg, and that this explanation, therefore, satisfied the jury that the form of treatment given and to be given by the witness was proper, even though there were serious disadvantages in such use of the leg which might otherwise impede recovery. The testimony of Doctor Sexton (Tr. pp. 327-329) was that the theory of counter-irritation is not applicable to the kind of injury here involved and could be of no value in effecting healing. In the absence of any testimony on the part of the witness Dr. Osorio to the contrary, it is undisputed that such purported counter-irritation could not justify the use of the muscles of the leg for walking and other purposes, and had the witness been permitted to explain just what

he meant by such counter-irritation his view would have been put squarely before the jury, who could have determined in connection with the testimony of Dr. Sexton, whether or not such walking on the part of the defendant in error would impede her recovery. But the trial court having of its own motion stated to the witness that the question did not need to be answered, the jury were justified in assuming that the testimony of the witness was sufficient justification of the plan of treatment used and to be used, without further explanation. This completely beclouded the contention made and sought to be established by plaintiff in error from the cross-examination of Dr. Osorio, that the injury itself would not, under proper treatment, be a permanent one nor continue for the length of time stated by him, and that such injury would be permanent only if the witness persisted in his treatment and contention that such use of the muscles of the leg for walking and other purposes, while it would continue the separation of the tubercle, was in some way compensated by the theory of counter-irritation.

**Fair and full cross-examination is a right, denial of which is prejudicial and fatal error.**

That ordinarily the extent to which cross-examination may go is in the discretion of the trial court is undisputed. It is just as well settled, however, that the right to cross-examine is a *right* and not a privilege, where it is sought to be exercised as to the very issues involved; and where restriction of

such right prevents a party from eliciting from the witness testimony contradictory of his testimony upon direct examination upon the very matters at issue, it is error and is presumed to be prejudicial.

In the Federal courts the law as above stated has frequently been set forth in unequivocal language. The following excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Resurrection Gold Mining Co. v. Fortune Gold Mining Company,* 129 Fed. 668, 65 C. C. A. 180, 186 to 189, illustrates admirably the extent to which the right of cross-examination is protected by the Federal courts:

> "A fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of his right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court." * * *
>
> "On the other hand, the right of cross-examination upon the subjects opened by direct examination is invaluable, and it should be carefully preserved. Under the English and American systems of jurisprudence the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. *Heath v. Waters,* 40 Mich. 457, 471; *Sperry v. Moore's Estate,* 42 Mich. 353, 361, 4 N. W. 13. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of part, and omissions of other parts, of conversations and transactions, which are frequently more mis-

leading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations. It extends to the eliciting of every fact relative to the matters recited in the direct examination, which either conditions, qualifies, or weakens the statements there made, or supplies any omission in the earlier testimony of the witness concerning the subjects there treated. *Martin v. Elden,* 32 Ohio St. 297; 1 *Thompson on Trials,* p. 406. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called, and not that of the party on whose account the cross-examination is conducted. The former, and not the latter, is bound by the evidence elicited upon the cross-examination. *Wilson v. Wagar,* 26 Mich, 457, 458; *Campan v. Dewey,* 9 Mich. 417, 418. Hence it is no answer to a refusal to permit a full cross-examination that the party against whom the witness was called to testify might have made him his own witness and then have propounded to him the questions to which he was entitled to answers upon the cross-examination. 'No one is required to make his adversary's witness his own to explain or fill up a transaction he has partially explained already.' He has the right to bind his adversary by the truth elicited from his own witness. *Chandler v. Allison,* 10 Mich. 460, 473; *New York Iron Mine v. Negaunee Bank,* 39 Mich. 644, 660." * * *

"One is not deprived of his right of cross-examination by the fact that he may be able to obtain testimony tending to establish the fact he seeks from his own witnesses. If he were, the right of cross-examination would in the large majority of cases cease to be. A party has the right, if he can do so by proper cross-examination, to prove the facts he relies upon by the cross-examination of the witness of his

adversary, by whose testimony the latter is concluded, although he may be able to introduce other witnesses to establish the same facts." * * *

"Nor can counsel escape a reversal of the judgment below upon the theory that, although this ruling was erroneous, it was not injurious to the defendant, and that for two reasons: In the first place it is the general rule of the federal courts that error produces prejudice, and that it cannot be disregarded unless it appears beyond a doubt that the error complained of did not prejudice and could not have prejudiced the rights of the party who assigns it. *Boston & Albany Railroad v. O'Reilly,* 158 U. S. 334, 337, 15 Sup. Ct. 830, 30 L. Ed. 1006; *Deery v. Cray,* 5 Wall. 795, 807, 18 L. Ed. 653; *Gilmer v. Higley,* 110 U. S. 47, 3 Sup. Ct. 471, 29 L. Ed. 62. In the second place, the presumption is that the answer to a question propounded would have been favorable to the party who asked it, that he would have followed the inquiry thus opened farther, and that his cause was prejudiced by the suppression of the investigation. *Martin v. Elden,* 32 Ohio St. 282, 287; *Buckstaff v. Russell,* 151 U. S. 626, 637, 14 Sup. Ct. 448, 38 L. Ed. 292; *Atchison, Topeka & S. F. R. Co. v. Phipps,* 125 Fed. 478, 480, 60 C. C. A. 314."

Language to exactly the same effect was subsequently used by the same court in *Heard v. United States,* 255 Fed. 829, 832, et seq. In each of the foregoing cases the judgment of the lower court was reversed by reason of the improper restriction of the right of cross-examination.

The rule that when a court can see affirmatively that the error complained of worked no injury to the party appealing, it will be disregarded, is not

applicable to an improper restriction of the right of cross-examination unless it appears so clearly as to be beyond doubt that the error did not and could not have prejudiced their rights. This rule was stated by the United States Supreme Court in *Deery v. Cray,* 5 Wall. 807, and was subsequently approved by the same court in *Gilmer v. Higley,* 110 U. S. 47, and *Eames v. Kaiser,* 142 U. S. 488. See also,

1 *Greenleaf on Evidence,* Sec. 446;
*Chamberlayne's Law of Evidence,* Sec. 3721;
5 *Jones on Evidence,* Sec. 842;
1 *Thompson on Trials,* Second Edition, Sec. 406;
*Prout v. Bernard's Land & Sand Co.,* 77 N. J. L. 722, 73 Atl. 487, 25 L. R. A. S. 635, note.

In view of the fact that the questions directed to Dr. Osorio on cross-examination, which he was not permitted to answer, pertaining to the effect of the treatment given and to be given by him to the defendant in error, had a direct bearing upon the question of whether the principal injury complained of was a permanent or temporary one, and that this constituted one of the foremost issues in the case, and in view of the further fact that the verdict of the jury was undoubtedly based and could only have been based upon the conclusion that the injury is a permanent one, there can be no question, in the light of the foreging authorities, that the restriction of the cross-examination of Dr. Osorio

was extremely prejudicial and fatal to the defense of plaintiff in error.

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**TRIAL COURT'S REFUSAL TO PERMIT THE PRODUCTION OF MEDICAL WORKS AND TO CROSS-EXAMINE THEREON CONSTITUTES PREJUDICIAL ERROR.**

By referenec to assignment of Error No. 4, on page 373, of the Transcript, it will appear that in such cross-examination Dr. Osorio referred to the books of certain medical authors in support of his testimony. The record at this point indicates that the authorities were cited merely in support of the statement that cartilage and bone heal in the same period of time and that this takes generally from three to five weeks. From the motion made by counsel for plaintiff in error for the production of these books, appearing on page 249 of Transcript, and from the question of counsel for defendant in error on redirect examination of the witness as to the same matter, on page 294 of Transcript, it would seem to be entirely clear that the authorities referred to by Dr. Osorio were so referred to by him in support of his testimony that if the injury to defendant in error's leg, such as had been testified to, did not heal within the first three to five weeks, it could not be expected to heal until after some years. But though the record is not without some doubt upon this particular assignment of error, this question does not arise as to the assignments numbered six and twelve. On page 265 of the Tran-

script, upon the cross-examination of Dr. Osorio, the following occurred:

> "Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?
>
> A. I will mention De Costa.
>
> Q. Have you De Costa with you?
>
> A. I have it over at the house.
>
> Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University?
>
> A. Yes.
>
> Q. And if you had De Costa could you refer us to the passage in that work to which you are using in support of your statement?
>
> A. Yes, sir.
>
> Q. (Judge Stanley) If the court please, I now renew my motion that the witness do procure the book to which he has referred, that I may be able——
>
> Judge Thompson. The court overrules the motion, for the reason that the court allowed this witness to be questioned and even cross questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements."

Upon the re-direct examination of Dr. Osorio by counsel for defendant in error (Tr. p. 284), the Doctor testified that Keene also is authority

> "upon the proposition that if the healing of an injury such as plaintiff has suffered would not be effected from three to five weeks that you cannot expect a recovery until after some years."

The witness answered that Keene is such an authority and that it is a standard work. Thereupon counsel for defendant in error exhibited Volume II of the work to the witness and asked him to find the portion thereof substantiating his testimony. The trial court refused to allow this stating that it could not be done on re-direct examination. Thereupon counsel for plaintiff in error asked the witness to turn to that portion of Keene's work supporting his testimony and again the trial court refused to allow this, stating that it was "getting beyond the rules of evidence" (Tr. p. 285).

It is well established in most jurisdictions that it is not competent to read from medical authorities to the jury upon direct examination. It is just as well established, however, that where a witness refers to a medical authority in support of his testimony he may on cross-examination be confronted with such authority and asked to read therefrom in support of his testimony or the jury may be shown, by reading from the work, that the same does not support the testimony given. The general rule and the distinction are stated in 3 *Wigmore on Evidence,* Sec. 1700, as follows:

> "It has been in some Courts held that counsel *on cross-examination,* may, for discrediting purposes, read a professional treatise as opposing the statement of an expert on the stand, or ask whether a contradictory opinion has been laid down by others. But this is generally repudiated. There is here, however, a legitimate use,

> i. e. where a witness has been allowed to refer to a treatise as corroborating him, *the treatise may be read to show that it does not contain such corroboration, on the principle,* (ante, Sec. 1000) *of discrediting a witness by showing misstatements on a material point.* This orthodox purpose, as expressly distinguished from the indirect introduction of the books on their own credit (as above noted), is fully recognized."

Quoting from *Pinney v. Cahill,* 48 Mich. 487, 12 N. W. 862, to the same effect:

> "It was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it."

The extreme importance of permitting the party to confront a medical witness with the authority relied upon by him, lies in the fact that unless impeachment in this manner is permitted, an incompetent medical witness could give unfounded and unsound opinions which would carry some semblance of weight and authority by reason of the names of prominent persons in that field to whom such witness could refer as substantiating his opinions. That this is the reason for the rule appears from the following portion of the opinion in *Clark v. Commonwealth,* 63 S. W. 740:

> "Where a physician testifying for the prosecution as an expert refers to a medical author as supporting his view, the defendant *should be permitted to cross-examine him as to what the author states,* so as to lay the foundation for reading the authority to the jury for the purpose of discrediting the witness. * * *

> "And we think such must be the sound view; otherwise an ignoramus in a profession might, by an assertion of learning, declare the most absurd theories to be the teachings of the science of which he was a professed expert, and, when pressed upon cross-examination as to either his own experience or the basis of his learning, would be enabled to hide behind the formidable name of some standard author, and thus foist upon the jury a most hurtful falsehood as a scientific deduction, asserted by the most eminent in the profession, solemnly declared and promulgated by him for the guidance of his brethern and the service of mankind. Therefore, in a case where such a witness makes such an attempt, it is just and reasonable that the opposite side should be permitted to test the truthfulness of his statement, and expose his ignorance or mendacity *by either compelling him* to admit upon an inspection of the authority that it does not sustain his views, or by reading the authority to the jury to prove that it does not, and that the witness, either through ignorance or base motive, has falsely deposed."

We are confident that the reason and the justice of the rule above stated commend themselves most strongly to this honorable court and that their application to the proceedings in this case demonstrate that prejudicial error has been committed by the trial court.

As to the first group of authorities cited by the witness and to the work by De Costa referred to by the witness, under assignment of Error Number 6, (Tr. p. 265) it was necessary for the witness to go to his home and office in the town of Hilo to procure

them. This he was willing to do (Tr. p. 248) and as the trial itself consumed several days and the witness was on the stand during a great deal of that time, it would have been no hardship to have asked the witness to bring one or all of these works into court upon the reconvening of court after any afternoon or evening adjournment. While it may be said that thus to instruct the witness to bring books into court with him may be in the trial court's discretion, such discretion must, as in all cases, be exercised reasonably. Under the present circumstances, where the only proof of the permanence of the injury to defendant in error was the testimony of Dr. Osorio, claimed by him to be supported by eminent medical authors, it was highly important to the defense of plaintiff in error that the jury be informed to what extent if at all such medical authors would in fact subscribe to the opinion of the witness. On its face, the opinion of the witness that merely because the injury did not heal in the first three weeks it could not be expected to heal until the defendant in error had reached her twentieth or twenty-fifth year or at least not for some years, seems incredible, particularly in the light of the flat contradiction of this view by Dr. Sexton. If in this situation plaintiff in error could have confronted Dr. Osorio with the works relied upon by him in support of his opinion and the Doctor had himself shown by his reading from those works to the jury that they did not support his opinion, the effect upon the jury must un-

doubtedly have been that they would not have accepted Dr. Osorio's contention and would have found that the injury was not permanent but could readily be healed within a few weeks.

Under circumstances of this nature, and where the books to be produced were so readily accessible, and such production would not have delayed the conduct of the trial, it must be considered as an abuse of the discretion vested in the trial court not to require such production.

But in the trial court's refusal to permit a cross-examination of the witness upon the medical work cited by him, known as Keene's Surgery (assignment of error No. 12), no question of discretion vested in the trial court was involved. It was not necessary to ask the witness to produce the book. The book was in court, it had been shown to the witness by counsel for defendant in error on redirect examination while he was on the stand, and it was immediately thereafter again shown to the witness on recross examination by counsel for plaintiff in error. The witness had cited this authority as a standard work upon the proposition that the injury complained of, not having healed within three to five weeks, could not be expected to heal for some years. This conclusion was upon one of the most important issues before the trial court; the plaintiff in error had a right to compel the witness to turn to that portion of the authority relied upon by him to make him prove that it did in fact sustain his opinion.

The matter was directly in issue, and no question of discretion to permit cross-examination upon collateral or irrelevant issues was involved. That the trial court completely confused the rules of evidence concerning the admission of extracts from medical works, and ignored entirely the distinction set forth in the authorities above quoted, is clear from the court's comment (Tr. p. 285) that counsel's request of the witness to point out the relevant portion in Keene was "getting beyond the rules of evidence". It appears further from this attitude of the court and from its refusal to permit any portion of the book to be read on redirect examination that the court considered the book and every portion thereof incompetent evidence for all purposes, and would not have permitted the plaintiff in error to read any portion of the work to the jury even though that portion be in contradiction of the testimony of the witness. Further proof of the trial court's inability to grasp the point of counsel's purpose in asking that the witness be confronted with the authorities cited by him appears in its comment (Tr. p. 266) in overruling the motion for the production of the surgical work by DeCosta, that the reason for such ruling is that the court

> "allowed this witness to be questioned and even cross questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements".

Thus it is evident that the trial court considered that the medical works were sought to be used by

plaintiff in error as direct proof of the matters contained therein or else the trial court labored under the misapprehension that once a medical witness has qualified as an expert, his testimony cannot be impeached, even by the very authorities relied upon by him.

Further misunderstanding by the trial court of the purpose of using the medical works in question, and of the principal issue, whether the alleged injury was temporary or permanent, appears from the question by the trial court to the witness (Tr. p. 279), whether the witness had given the defendant in error such treatment as his experience, his ability and medical science would dictate, under all circumstances (assignment of error No. 11). The trial court believed apparently that the purpose of the cross-examination was to prove lack of skill on the part of the witness in treating the defendant in error and thus impute such negligence to the defendant in error, herself. This, of course, is not the true measure of care required of the defendant in error in employing a qualified physician and surgeon. It was never the purpose of plaintiff in error to hold defendant in error liable for the result of treatment which plaintiff in error contends was improper. The only purpose was to show that if the alleged injury had not yet healed at the time of trial it was only because the treatment pursued by the witness was improper, and that the substitution of proper treatment would result in a speedy and complete recovery. The trial court

by its question to the witness as above set out, and the latter's affirmative answer definitely informed the jury that they did not need to consider the kind of treatment theretofore rendered by the witness so long as the witness vouched for it as proper. This, of course, was consistent with the court's refusal to permit any showing that the authorities relied upon by the witness for his treatment did not support him. In each respect, therefore, the action of the trial court was highly prejudicial to the attempt of plaintiff in error to prove the alleged injury to be merely a temporary one.

From the foregoing it follows that the trial court committed further error (assignment of error No. 13) in refusing to strike out all of the testimony given by Dr. Osorio to the effect that the medical authorities named by him supported the opinions which he gave in his testimony.

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**THE EVIDENCE SHOWS THAT DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, AND THE TRIAL COURT ERRED IN REFUSING TO GRANT A NONSUIT UPON THAT GROUND (ASSIGNMENT OF ERROR NO. 14).**

The accident in question happened at 3 o'clock in the afternoon, in broad daylight. The grating on the sidewalk over the elevator shaft consisted of two doors, each of which was approximately four feet long and twenty inches wide. Of these, the farther one was open and rose above the sidewalk to a height of about seventeen inches, and

was plainly visible to anyone passing along the sidewalk. The defendant in error upon her direct examination testified as follows:

> "Before I got hurt I used to go past the place of the accident every day; used to go there frequently;—just as I got to the store I heard a call across the street and *as I looked I went down;* and after I looked I took about one step, and I went down *right away*" (Tr. pp. 167, 168).

On cross-examination she testified that when she heard the call she took one step and fell into the elevator (Tr. p. 175); that she was at the time she heard the call right on top of the elevator and almost in the hole (Tr. p. 175); that before she heard the call she was looking where she was going (Tr. p. 175); and that she was looking at the sidewalk when she heard the call (Tr. p. 175); that she looked across the street, took a step and fell into the hole (Tr. p. 175); that she knew what the hole in the sidewalk was for, loading freight (Tr. p. 175); that she had known of the elevator for about three years and knew what it was used for because she saw freight being unloaded there quite a number of times a day (Tr. pp. 176, 191, 192); that she had seen freight there very often and knew what the elevator was for (Tr. p. 178); that at the time she heard the call she was looking where she was going (Tr. p. 175). The only testimony offered by her to excuse her undoubted carelessness and even recklessness in stepping into a danger which she must have seen was that she had never before

stepped, fallen or stumbled into the hole (Tr. p. 168), and that just as she was on top of the grating and was about to step into the shaft her attention was diverted and she went into it (Tr. p. 167).

It is true that the care required of a child is not measured by the care required of an adult, and that the conduct of a child is governed by the conduct reasonably to be expected of children of the same age, capacity and intelligence, and that generally the question of due care on the part of children is one to be determined as a matter of fact by the jury. It does not follow, however, that the facts may not be such as to require a ruling by the court that the child was, as a matter of law, guilty of negligence proximately contributing to her injury and barring her recovery. Such a rule is a reasonable and necessary one and has found support in the authorities.

In *Kauffman v. Machin Shirt Company,* 167 Cal. 506, such contributory negligence on the part of a child fifteen years old was held to have been established as a matter of law from the allegations of the complaint that the child had stepped from an elevator through an open door onto the premises of the defendant and within one minute thereafter returned through the same open door, believing that the elevator was still there, and stepped into the open shaft, because in the meantime the elevator had been moved by someone else. In that case the ruling was based upon the common sense view that if the child had looked before he stepped, he would

have known of the absence of the elevator, and that under the circumstances he should have looked first. Other holdings to the same effect will be found collected in a note in *L. R. A.* 1917F at pp. 199 et seq.

In the case at bar the testimony of defendant in error herself shows that she not only knew of the existence of the elevator and the grating over it, and had known of it for several years, but that at the time of the accident she was looking directly before her on the sidewalk and must, therefore, have seen the grating in its actual condition. One of the doors rose before her to a height of seventeen inches and a width of four feet, and was directly in her path and plainly visible. If she was looking before her, as she says she was, her proximity to the shaft makes it absolutely certain that she saw the farther half of the grating up, and the shaft partially open. She herself testified that she took one step after her attention was diverted, and then fell into the hole. This can only mean that she was at the very moment when her attention was diverted on the half of the grating that was not open. She knew, therefore, that she was over the elevator and if her testimony is to be believed, which certainly she herself must concede, she knew when she stood on the grating that the other half was up and the shaft exposed. Knowing this, it was her imperative duty not to step forward. The fact that she did step forward shows conclusively that she was careless and was

not paying the necessary attention to her surroundings for her own safety. It is not sufficient that she had a right to believe and assume that the sidewalk was in safe condition, because she knew, or must have known, because her senses so informed her, that the sidewalk at that particular place was not in a safe condition. She must be held to have known the consequences of proceeding toward the open shaft and her general testimony on the stand, as well as her age and experience, indicate that she should have appreciated the danger of which she must have known. Under the circumstances the only explanation which can be made of the fact that the accident happened, in the face of her knowledge of the conditions, is that the plaintiff in error was absent-minded or she was so engrossed with the conversation she heard across the street that she ceased to pay further attention to a known danger into which she voluntarily walked.

While the cases are rare where it can be said that a child is guilty of contributory negligence, as a matter of law, those cases can and do arise, and it is the contention of plaintiff in error that this one is such a case. Certainly no clearer example can be found of such utter disregard of a disclosed danger by a child of intelligence and experience as was demonstrated in the present instance.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY UPON THE MEASURE OF CARE REQUIRED OF THE DEFENDANT IN ERROR.

The instructions given by the trial court and set forth under assignments of error numbers 15, 18 and 19, charged the jury that the defendant in error had a right to assume that the sidewalk was in a reasonably safe condition and had a right to act upon that assumption. It further charged the jury as a fact that the defendant in error had no knowledge of any defects in the sidewalk. While those instructions as to the right of the defendant in error upon the sidewalk may be accurate as abstract propositions of law, they are entirely inaccurate when applied to the evidence already referred to, which shows beyond a question that the defendant in error did have knowledge of the defects in the sidewalk, and could not, therefore, assume that it was in a reasonably safe condition. It was, of course, extremely prejudicial error to have instructed the jury that as a matter of fact the defendant in error had no knowledge of any defects, for even if such a conclusion could by any possibility be reached from the testimony of the defendant in error, herself, such a conclusion could be drawn only by the jury itself and could not be made by the trial court and given to the jury as an established fact. It follows that both as to the law here applicable and as to the evidence itself, the court's instructions were erroneous. That such a general instruction is error even though correct as

an abstract proposition was held in *Garman v. City of Waverly,* 166 Ill. App. 399, 401, in which the verdict for the plaintiff based upon a similar instruction was reversed. The instruction and the court's comment thereon are as follows:

> "'The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city, which is in constant use by the public, has a right either in the day or night time, when using the same with due diligence and care, to presume, and to act on the presumption, that it is safe for ordinary travel throughout its entire width, and free from all dangerous holes or obstructions.'
>
> "From the evidence of appellee a jury might find that she knew all about the situation of the stairway. She admits she knew it projected into the sidewalk but did not think it projected so far. Knowing the stairway was there, she could not presume it was not. The instruction quoted is correct as a general proposition where a person has no knowledge of a defect, but it is not the law where a person knows that the sidewalk is not safe. A person, knowing a sidewalk to be unsafe, has no right to presume it is safe, and act on such presumption. Concerning such an instruction it was said in *City of Spring Valley v. Gairn,* 182 Ill. 237: 'Had there been any evidence to show that appellant was aware of the condition of the street the instruction would have been improper, and in *City of Sumner v. Scaggs,* 52 Ill. App. 551, the case was reversed because of error in giving such an instruction. The giving of abstract propositions liable to mislead a jury has invariably been condemned."

THE MOTION OF DEFENDANT IN ERROR FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED UPON ALL OF THE GROUNDS URGED AND UPON THE FURTHER GROUND THAT THE DAMAGES AWARDED WERE EXCESSIVE.

The grounds for the granting of a new trial which were urged upon the argument of the motion are those hereinbefore considered at length in this brief. The affidavits filed with the motion showed, with reference to the publication of the article in the Daily Post-Herald, that the article had been read by at least one of the jurors during the conduct of the trial and was accessible to the others. Upon this ground, as well as upon all of the grounds hereinbefore urged, the motion for a new trial should have been granted. While it is true that the granting of such motion is in the discretion of the trial court, here again the situation was such that refusal to exercise such discretion by the granting of a new trial was an abuse of discretion by reason of the manifest error committed and the injustice done to the plaintiff in error in depriving it of a fair trial.

The motion was further based upon the ground that the verdict of $7250 was excessive. It must be conceded that damages in such amount could be reasonable only if the jury had first found that the injury to defendant in error's leg was permanent, such as urged by the witness Dr. Osorio, and even if the jury had so found, the amount awarded is so large for such an injury as to make it entirely probable that the jury were influenced in fixing the

amount by their knowledge of the alleged fact, as published in the newspaper, that an insurance company was defending the case and would be the one liable for the amount of the verdict. In view of the manifest error of the trial court during the cross-examination directed to the witness Dr. Osorio, upon the question whether or not the injury would be permanent, and of the further fact that prejudicial alleged information was placed before the jury, which was otherwise inadmissible, it must be held that the plaintiff in error did not have the unbiased and dispassionate judgment of the jurors in their effort to fix the amount of damages which they considered the defendant in error should have received.

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**THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CALLING TO THE ATTENTION OF THE JURY THE AMOUNT OF DAMAGES CLAIMED BY THE DEFENDANT IN ERROR.**

Under assignment of error No. 20 appears the instruction of the court upon the measure of damages to be considered by the jury, with the closing statement "but in no event in a sum in excess of the amount of $11,500". It is the contention of plaintiff in error that such mention by the court to the jury in its instructions of the amount claimed by the defendant in error was highly prejudicial to the plaintiff in error in that it gave to the jury an estimate of an amount which should have remained entirely unliquidated, in order that the jury in arriving at the ultimate amount should be en-

tirely untrammeled and uninfluenced by the estimates of others, whether of parties, counsel or the court. That this right of plaintiff in error is a substantial one and that its violation is not to be lightly disregarded appears from the opinion of the Circuit Court of Appeals for the Third Circuit in *Vaughan v. Magee,* 218 Fed. 630, where the verdict of the jury in favor of the plaintiff in an action for damages was reversed upon the sole ground that counsel referred in his examination of a witness to the amount of damages claimed by the complaint, and upon the motion of defendant thereupon made for the withdrawal of a juror and the entry of a mistrial, the lower court denied the motion, though strenuously urging upon the jury its duty to disregard the statement.

The reason for the rule is most apparent in cases like the present, where the amount to be claimed by the plaintiff is in his discretion and is without bearing of any kind upon the amount of actual damages, which is itself unliquidated and can become liquidated only by the verdict of the jury. In the Vaughan case practically the entire opinion is concerned with the error of the lower court. The relevant portions are as follows:

> "After careful consideration of the case, we are of the opinion there was a mistrial below, and the judgment must be reversed. We regret this controversy could not have ended with this trial; but the question here involved reaches beyond the present case and parties, and affects the proper trial of the large and growing number of cases for personal injuries now finding their way to federal courts.

"In the ordinary suit on a bond, note, contract or account, the amount in suit can be stated, goes in evidence, and affords the jury a money basis on which the rights of the parties can be determined. In damage cases there is no fixed sum in controversy. The amount of damages a party recovers is ascertained by the jury from evidence regularly offered and admitted by the court of such pertinent facts as will enable the jury to itself fix the money value of the injury sustained. While among those facts may, at times, be certain definite amounts in the way of medical, surgical, and nursing expenses, and other items capable of exact fixation, yet, when it comes to determining the amount of the damages to be awarded, this is the province of the jury alone, and of a jury uninfluenced by the figures or estimates of any other person as to the amount thereof. The law, therefore, permits no estimate to be given by either party to the jury, even under oath, of the money amount of such damages, and to get the same character of estimates before a jury by indirect methods is a reprehensible practice.

"Whatever may be the practice in other jurisdictions, the courts of Pennsylvania have been stern and unyielding in that regard. Wherever a court, in its charge, or counsel, in addressing a jury, have brought to a jury's notice that a plaintiff claimed a fixed sum for damages, it has been adjudged a mistrial. *Carother v. Pittsburgh Railways Co.*, 229 Pa. 560, 79 Atl. 134; *Reese v. Hershey*, 163 Pa. 253, 30 Atl. 907, 43 Am. St. Rep. 795; *Quinn v. Phila. Rapid Transit Co.*, 224 Pa. 162, 73 Atl. 319; *Dougherty v. Pittsburgh Railways Co.*, 213 Pa. 346, 62 Atl. 926; *Hollinger v. York Railway Co.*, 225 Pa. 419, 74 Atl. 344, 17 Ann. Cas. 571. The bar of the state has loyally

supported this view, and this seems a fitting case for this court to emphasize and restate, as applicable to the federal courts of this circuit, the ruling of those cases.

"We will not enter into a speculative analysis of what effect the statement, and its repetition to the jury had. It suffices to say the jury improperly had before it substantial statements of matters which were not only not in evidence but which on no principle of law could have been admitted in evidence. The possibility of the verdicts of juries being based on that which is not evidence goes to the very foundation of that fair and impartial trial for which courts exist. Whether the objectionable statements did or did not influence the jury in this particular case is not the test, for this court cannot permit any such practice to obtain even a foothold in this circuit."

It will be further noted that the means used by the counsel for defendant in the above case to protect the defendant from the improper statement to the jury was by a motion for the withdrawal of a juror and the entry of a mistrial, which is the same procedure as was followed in the case at bar. The Circuit Court of Appeals there held, without discussion, that the motion should have been granted, and thereupon reversed the judgment and ordered a new trial.

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## Conclusion.

It is the firm and sincere conviction of the plaintiff in error that it has not in this case been accorded a fair trial. It was compelled to proceed after the

jurors were given alleged information that could not have been other than highly prejudicial to the cause of plaintiff in error; it was compelled to continue with the trial though there was every probability that the jurors believed that not the plaintiff in error but an unknown insurance company was the real defendant in the case, and that not the question of liability but the question of how much should be awarded to the defendant in error was the one actually to be decided by the jury. And following upon such a prejudicial change in the attitude which the jury should have assumed and retained throughout the trial the lower court permitted the medical witness for defendant in error and the one who had treated her, to predict permanent injury, which alone could account for substantial damages, and to support such prediction by naming eminent medilal authors whose works were accessible, and in court for inspection, but which works the plaintiff in error was not permitted to exhibit to the medical witness so as to have him point out those portions of the works which would in fact substantiate his opinion. After the jury was thus undoubtedly prejudiced, and was permitted to receive unsupported testimony of permanent injury, the court proceeded erroneously to instruct the jury as to the rights of the defendant in error upon the sidewalk, in utter disregard of the actual facts testified to by the defendant in error herself, and of the inferences necessarily to be drawn therefrom. And

to increase the bias which must have been created in the minds of the jury in favor of defendant in error, the court proceeded to state to the jury the amount of damages claimed by the defendant in error and thus gave to the jury a basis upon which it could proceed to fix the damages, when in fact no such basis should have been furnished and the jury should have been permitted and compelled to fix the amount purely from the law and the evidence and without outside assistance. The plaintiff in error feels, therefore, that it has ample reason and justification for its contention that throughout the trial and at every turn it did not have a proper and full opportunity to present its defense, and that, therefore, the judgment of the court below should be reversed and a new trial ordered.

Respectfully submitted,
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